

---

**UTAH LABOR COMMISSION**

**CARL W. BORUP,**

**Petitioner,**

**vs.**

**WINDER DAIRY and WORKERS  
COMPENSATION FUND,**

**Respondents.**

**ORDER SETTING ASIDE  
ALJ'S DECISION AND  
AWARDING BENEFITS**

-----  
**ORDER OF REMAND**

**Case No. 20040320**

---

Carl W. Borup asks the Utah Labor Commission to review Administrative Law Judge Sessions' denial of permanent total disability compensation to Mr. Borup under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

**BACKGROUND AND ISSUE PRESENTED**

Mr. Borup claims workers' compensation benefits from Winder Dairy and its insurance carrier, Workers Compensation Fund, (referred to jointly as "Winder Dairy") for a work accident that occurred on June 19, 2002. Following the evidentiary hearing, Judge Sessions appointed a medical panel to resolve conflicting medical opinions related to Mr. Borup's claim of permanent total disability, particularly his functional capacity and physical limitations. After reviewing the panel's report, Judge Sessions adopted the panel's opinion and denied Mr. Borup's claim for permanent total disability compensation.

In his motion for review, Mr. Borup argues that he is entitled to a preliminary order for permanent total disability compensation because he is significantly impaired, he is permanently and totally disabled, and his disability is directly caused by the work accident.

**FINDINGS OF FACT**

The following facts are relevant to Mr. Borup's claim for permanent total disability compensation, as presented in his motion for review:

Mr. Borup worked for Winder Dairy as a delivery route manager. His duties required him to load and unload product from his work truck for customer deliveries. On June 19, 2002, Mr. Borup was out on delivery, driving at approximately 55 miles per hour, when a tire blew. The delivery truck rolled several times, rolling over both of Mr. Borup's legs, who had been thrown from the truck at some point during the accident. He was diagnosed with open bilateral distal tibiofibular

**ORDER AWARDING BENEFITS / REMAND**  
**CARL W. BORUP**  
**PAGE 2 OF 6**

fractures and a fractured clavicle and immediately underwent surgery with Dr. Parry. He was discharged from the hospital on June 26, 2002, and began rehabilitation. He required additional surgery on August 2, 2002, and again in April 2003. Within a month before his third surgery, Winder Dairy offered Mr. Borup a light duty job, but, because of the proximity to his impending surgery, he did not accept the offer.

On September 24, 2003, Dr. Parry found Mr. Borup had reached maximum medical stability. Dr. Parry stated that Mr. Borup could not work in "any job that requires walking, pushing, pulling, carrying or manual labor of any type and that he will need to be retrained to do some type of sedentary work wherein he is not required to do much ambulating at all." He later assessed Mr. Borup's physical restrictions as follows: during a typical day Mr. Borup would occasionally (6%-33% of the time) experience pain or other symptoms severe enough to interfere with attention and concentration needed to perform even simple work tasks; he can walk 1-2 blocks without severe pain; he can sit 2 hours before needing to get up and stand five minutes before needing to sit down or walk around; he can tolerate no hours of standing or walking and at least 6 hours of sitting during an 8-hour day; and will need to take unscheduled breaks during an 8-hour day for 10-15 minutes.

Although Mr. Borup's fractures and wounds reached MMI by September 2003, his left foot pain continued. By February 2004, it was observed in a functional capacity evaluation that Mr. Borup had a standing tolerance of one hour 15 minutes and a walking tolerance of 10-15 minutes. Also in February of 2004, Winder Dairy's medical consultants, Drs. Moress and Morgan, evaluated Mr. Borup and agreed that the accident caused Mr. Borup's orthotic problems, but disputed that Mr. Borup's continuing left foot pain was caused by the accident, indicating instead it was diabetic polyneuropathy. However, later nerve studies showed that Mr. Borup's left foot pain was caused by nerve damage from the severe fractures he suffered in the work accident.

Sometime in 2004, at the vocational rehabilitation counselors' recommendation, Mr. Borup began taking classes in drafting at the community college. On March 8, 2004, Winder Dairy contacted Mr. Borup with another light duty job as a telemarketer; however, the position did not pay either Mr. Borup's previous wage working for Winder Dairy or the current state average weekly wage. After discussing the offer with his attorney and requesting further information regarding the position, Mr. Borup declined the offer.

Following the evidentiary hearing, Judge Sessions appointed a medical panel to offer its opinion as to Mr. Borup's medical capacity and physical limitations. The medical panel reviewed the medical record and examined Mr. Borup. The panel noted Mr. Borup's malalignment with deformity of the right tibia above the ankle and his chronic left foot pain, all of which it found was caused by the June 19, 2002, accident. The panel assessed a 15% whole person impairment rating and recommended work in the sedentary level classification, stating:

. . . it is likely that he will have difficulty with occupations requiring prolonged walking or standing. This would include occupations requiring repetitive lifting in

**ORDER AWARDING BENEFITS / REMAND**  
**CARL W. BORUP**  
**PAGE 3 OF 6**

the erect position. He could, however, function in an occupation requiring some degree of changes in position from sitting to standing and walking short distances. We find it doubtful that he requires a cane for ambulation. . . .

The panel further stated that “the only medical impairment that would limit [Mr. Borup’s] ability to perform basic work functions would be pain in the left foot aggravated by prolonged walking.”

Mr. Borup, whose date of birth is July 22, 1966, was 35 at the time of the accident. Mr. Borup’s previous work history included work as a landscaper, a cashier at 7-11, building trusses, and as a groundskeeper for a motel. All the positions identified generally required Mr. Borup to be on his feet for at least 8 hours a day, and required some heavy lifting. In 1995, Mr. Borup received an associate degree and, since working with the vocational rehabilitation counselors in 2004, has begun taking drafting classes.

At the hearing, Mr. Lister, a vocational expert, testified as to whether there were jobs available to Mr. Borup based on the limitations from the medical records and the results of a vocational assessment test. Mr. Lister also reviewed the two light duty positions that Winder Dairy previously offered Mr. Borup. He concluded that, taking into account his physical limitations and qualifications, there was no work reasonably available to Mr. Borup.

**DISCUSSION AND CONCLUSION OF LAW**

The issue before the Commission is whether Mr. Borup is entitled to permanent total disability benefits. In order to be entitled to such benefits, § 34A-2-413 of the Utah Workers’ Compensation Act requires Mr. Borup to show that (1) he suffered a significant impairment or combination of impairments from the work accident; (2) he is permanently and totally disabled; and (3) the work accident was the direct cause of his disability. Judge Sessions’ concluded that Mr. Borup failed to establish any of these three criteria. In his motion for review, Mr. Borup argues that the evidence in the record shows that he did establish all necessary criteria. Therefore, the Commission will review each criteria to determine whether he qualifies for a preliminary order for permanent total disability compensation.

**Significant impairment from the work accident.** To satisfy the first element, Mr. Borup must show that he suffered a significant impairment or combination of impairments from the work accident. As a result of the work accident, Mr. Borup has malalignment with deformity of the right tibia above the ankle and chronic left foot pain caused by nerve damage from the severe fractures. These impairments have left him with a 15% whole person impairment. The Commission finds that Mr. Borup did suffer significant impairments from the work accident and has proven the first element.

**ORDER AWARDING BENEFITS / REMAND**  
**CARL W. BORUP**  
**PAGE 4 OF 6**

**Permanent and total disability.** Subsection 413(c) of the Act provides a four-part test for determining whether an employee is permanently and totally disabled. Under this section, Mr. Borup must show that (1) he is not gainfully employed; (2) he is limited in performing basic work activities; (3) he is unable to perform his former work; and (4) he is unable to perform other work reasonably available taking into account his age, education, past work experience, medical capacity and residual functional capacity.

Mr. Borup is not gainfully employed and therefore meets the first test. The second test is whether Mr. Borup is limited in performing basic work activities. The Commission notes that basic work activities refers to common activities shared in a wide variety of occupational settings, not just one particular position or field of positions, and includes review of an employee's comprehension and ability to communicate. Based on the evidentiary record, including Mr. Borup's testimony as to his current pain levels and difficulty in concentrating and the fact that Mr. Borup does have significant limitations in his ability to stand and walk, the Commission finds that Mr. Borup is limited in performing basic work activities.

The third test asks whether Mr. Borup is unable to perform his former work. The Commission finds Mr. Borup cannot return to his previous work, which required him to load and unload his truck and walk short distances several times during his deliveries. His other previous work also generally required Mr. Borup to stay on his feet for the duration of his 8-hour work day. Thus, Mr. Borup has met the third test.

The final test requires Mr. Borup to show that he cannot perform other work reasonably available taking into account his age, education, past work experience, medical capacity and residual functional capacity. Judge Sessions, in adopting the panel's opinion on Mr. Borup's medical capacity, failed to consider this factor against the other pertinent factors of Mr. Borup's age, education, past work experience, and functional capacity. Although relatively young, Mr. Borup's past work experience has primarily been in jobs requiring physical activity and exertion, none of which Mr. Borup can presently do. Mr. Borup's medical and functional capacities place him in a sedentary work level classification. However, according to the vocational expert, sedentary jobs such as telemarketing or customer service—similar to jobs Winder Dairy offered Mr. Borup—usually require an aptitude in oral communication. Mr. Borup's vocational test indicates he does not have strong language usage development and would not have the aptitude for phone solicitation or similar work primarily requiring oral communication skills. Mr. Lister reviewed Mr. Borup's limitations and restrictions and, applying Mr. Borup's tested vocational skills, did not find any work reasonably available to him.

Winder Dairy provided as evidence of other work reasonably available, two job offers that were made and denied. The first offer, however, is not particularly relevant since Mr. Borup was anticipating a lengthy recovery following an imminent surgery. The second offer, although questionable as to whether it would meet Mr. Borup's restrictions or qualifications, would also not have offered him the same rate of pay he was previously earning or the state's average weekly pay,

**ORDER AWARDING BENEFITS / REMAND**  
**CARL W. BORUP**  
**PAGE 5 OF 6**

and thus did not constitute other work reasonably available under Commission Rule R612-1-10(D). The Commission finds that Mr. Borup is unable to perform other work reasonably available, thereby satisfying the last test to establish that he is permanently and totally disabled.

**Direct cause of disability.** The final element to proving entitlement to permanent total disability compensation requires Mr. Borup to show that the injury caused by his work accident is the direct cause of his disability. Prior to the June 19, 2002, work injury, Mr. Borup had some history of migraines and ADHD, and was diabetic. However, these were relatively under control and did not prevent Mr. Borup from working. It was only after the accident that Mr. Borup was left with significant impairments that prevent him from working. His other conditions, currently maintained, are not the cause of his present disability. Therefore the Commission finds Mr. Borup's work accident is the direct cause of his disability.

In summary, the Commission finds Mr. Borup has established the elements necessary for a preliminary order for permanent total disability compensation will remand the matter to the Adjudication Division for further proceedings as necessary to complete Mr. Borup's claim.

**ORDER**

The Commission sets aside Judge Sessions' decision and hereby orders that Mr. Borup is entitled to a preliminary finding of permanent total disability under § 34A-2-413(1) of the Utah Workers' Compensation Act, subject to Winder Dairy's right under § 34A-2-413(6) of the Act to submit a plan to reemploy or rehabilitate Mr. Borup.

It is further ordered that Winder Dairy immediately pay subsistence benefits of \$433 per week to Mr. Borup, commencing on September 23, 2003, and continuing until otherwise directed by the appointed ALJ or the Commission.<sup>1</sup> Winder Dairy shall pay the amount of any accrued benefits to Mr. Borup in a lump sum, together with interest thereon at 8% per annum on any accrued payments. In computing the amount due Mr. Borup, Winder Dairy may offset any disability compensation previously paid to Mr. Borup during the relevant time.

It is further ordered that Winder Dairy shall deduct from the disability compensation otherwise due Mr. Borup's attorney's fees in the amount established by Commission Rule R602-2-4. Winder Dairy shall then pay the deducted attorney's fees directly to Aaron J. Prisbrey, Esq., Mr. Borup's attorney in this matter.

---

<sup>1</sup> At the time of the accident, Mr. Borup was married with two dependent children. The parties stipulated that Mr. Borup's average weekly wage was \$626.95. Thus, Mr. Borup's permanent total disability compensation rate, as of September 23, 2003, would be \$433 per week. [ $\$626.95 \times 66 \frac{2}{3} = 418 + \$15 = \$433$ ]

**ORDER AWARDING BENEFITS / REMAND**  
**CARL W. BORUP**  
**PAGE 6 OF 6**

It is further ordered that Mr. Borup's claim be remanded to the Adjudication Division for further proceedings necessary to receive and pass upon Winder Dairy's reemployment/rehabilitation plan for Mr. Borup, if any such plan is proffered, and for such other action as is necessary to resolve this matter.

Dated this 28<sup>th</sup> day of January, 2009.

---

Sherrie Hayashi  
Utah Labor Commissioner

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.